AN ARGUMENT AGAINST LIABILITY

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To me there is a graver issue involved in the enactment of liability laws in this country than the mere compensation of an injured employee. Our recent conceptions of an employers' liability are of foreign birth, the outgrowth of socialistic theories, which for years have been gradually permeating the states of Europe. There are two phases of this question which do not seem to be receiving the consideration which they deserve. I hold that under the spirit, if not the letter of our constitution, no ordinary employer of labor can justly be made liable for an injury for which he was not actually or constructively at fault, and that every attempt to impose such a liability is an attack on the manhood of employees as American citizens. Subject to the legitimate police power of the state, every American freeman has the constitutional right to contract for his services. Under all ordinary circumstances, this contract assumes that he is capable and willing to perform the work which he undertakes. Such service in free America, at least, is not different in its fundamental character from other business contracts; it is simply an exchange of personal labor for money compensation. Both parties are independent contractors. There is no more reason in the nature of things why a freeman who contracts for his manual labor should impose on the party with whom he contracts responsibility for injuries which are due to no fault of the latter than why a like responsibility should not attach to other forms of contract. As well might the architect or the builder who contracts for the erection of a dwelling allege the same responsibility. The fact that the ordinary servant is under a stricter and more detailed control goes no further than to enlarge the duty of the employer to see that his own acts are free from blame.

The only ground on which such legal responsibility can be claimed is the exercise of the police power of the state based on public policy. Is there any public policy which would sustain such police power in the case of ordinary employments? Here, a false

theory seems to have been universally accepted. It is assumed that employees would escape injury except for the special work in which they may be employed; that the responsibility for the injury attaches to the particular work being done. On the contrary, it may well be questioned whether in the ordinary occupations of life the risk of accident is not even less among those actively engaged in the service of others than if not so engaged. The employee is not a mere piece of mechanism, carefully housed and sheltered from danger except when actively in service. He is a man and a member of society, with all the obligations imposed on him by such membership. First and foremost of these obligations is that he shall do his legitimate share of the world's work. To earn his bread by the sweat of his brow is a law of nature imposed on man in his very evolution from a lower vertebrate. It is a law whose principle lies at the very foundation of all life, even that of the lowest monera or of the vegetable cell. Conscious or unconscious activity is the very essence of life. The evolution of society has simply moulded the lines along which this activity must be directed. It has simply organized the members into a social system under which their labor is differentiated and its fruits exchanged instead of, as among their savage ancestors, every man working for himself. We have simply exchanged slavery to untamed nature for a lesser servitude to society at large. Whether employed in the service of another or not, every man is exposed to the risk of accidental injury. There is nothing in all this which suggests a natural claim of one member against another for injuries due to his own fault or misfortune. On the contrary, the whole development of society has been along the line of protection to the worker. It is as true to-day as it was a thousand years ago that in the ordinary occupations of life the worker is in reality in a measure safeguarded through his very employment. Not until now has the truth of this great principle been seriously questioned. From the buried cities of Mesopotamia are unearthed the records of contracts made six thousand years ago, and in the laws of the Roman Empire, we may read the story of their transmission in spirit to the nations of modern Europe and to America. But nowhere heretofore, so far as I know, has the right and ability of a freeman to assume the risk of his employment been questioned.

What are the grounds of that public policy which it is claimed

has changed the nature of this contract relation that has existed from time immemorial? We are told they are to be found in the complex conditions of modern industrial life, under which the employee is subject to risks more hazardous than ever before, and to that greater economic differentiation which has widened the gulf between the workman and his employer, which has weakened the personal relations once existing between the two, and has reduced the former to little more than a machine to be exploited under a new system of employment, representing not men but soulless corporations; that giant monopolies of capital have practically reduced the workmen to a condition of industrial servitude. For these reasons, it is urged that public policy calls for the intervention of the police power of the state to compel either the individual employer or the state itself to assume that responsibility for injuries to the workers which they themselves formerly bore.

Whatever may be said for this argument under the monarchical systems of the old world, it fails in its application here, unless our whole theory of government is to be abandoned for another on essentially socialistic lines. The broadest liberty of the individual consistent with his obligations to society was a corner-stone, on which our whole national fabric was reared, and closely allied to it was another, protection of individual property rights against aggression even by the state. When Webster won that immortal decision concerning the sacred rights of property and of contract in the Dartmouth College case, which has ever since been the law of the land, he welded a construction into state and federal constitutions only less important than that involved in the conclusion of his famous debate with Hayne, a construction which has cost the best blood of the land to maintain "the Union now and forever, one and inseparable." Under our constitution, as it now stands, no plea of police power can well divest an employer of his property on the ground that he is liable for an injury where he was without fault. The application of this principle has been sought to be avoided by using the police power of the state to abridge the right of contract and compel the employer to incorporate the tacit assumption of a liability for injuries in his agreements with his workmen. How far the police power of a state may thus abridge the right of contract yet remains to be seen. In right reason, it would seem that no such power should exist in ordinary contracts of employment in which,

as already explained, the hazards of occupation are not essentially different from those of ordinary life. The workman here is asked to assume no increase of risk which can fairly be charged against the property of his employer, or be made a basis for public compensation, unless socialism is to be substituted for individualism in the spirit of our constitution. To employ and to be employed is a fundamental right of every citizen of the Republic, the very essence of our economic existence, even more—of our very civilization. No police power can properly abridge it more than the public welfare absolutely demands. It may well be doubted whether any plea of public policy can impose on every man who ventures to contract for the service of another an unknown liability for injuries due to the fault or misfortune of the latter with all its attendant train of fraud and blackmail, and it may be at the risk of his own financial ruin. No policy would seem more destructive to the actual welfare of the state. While in the case of certain corporate carriers, creatures of the state and impressed with duties to the public, such police power has been at times sustained, the Court of Appeals of New York in its recent decision has, by a unanimous vote, emphasized the principle that no public policy can be invoked to sustain a law which thus divests an employer of his property without his own fault, even though his liability may be limited to exceptionally dangerous risks. Our neighboring state of New Jersey in attempting to evade this decision by depriving the employer of his present protection by the court in case of his refusal to accept an unconstitutional law, strongly suggests an attempt to whip the devil round the stump. The defenses which it would deny him are grounded not on mere expediency, but are rooted in those principles of natural justice which underlie our economic system and have been well established in all our jurisprudence.

As a dictum unnecessary for the decision of the case, the New York Court of Appeals has declared that both the fellow servant and the contributory negligence clause as defenses are within the scope of legislative control. But it as strongly affirms that neither can be so modified as to impute to the employer a fault due to the employee. Both these clauses relate to the legal cause of the accident. The question of responsibility depends on this legal cause. Whether a fellow servant or an assumed negligence of the employee is in the legal sense the efficient cause or a mere link in the chain of

casualty, which no court will consider, must still remain, it would seem, a valid question of law regardless of such enactments as that of New Jersey. The act or neglect of the employer must still be the efficient cause of the injury in order to constitutionally impose on him the liability.

But gravest, perhaps, of all objections is the effect of such legislation both on the working men themselves and on the commonwealth at large. By such laws those who contract for their personal services are placed in a class by themselves politically subordinate to the rest of their fellows. They are no longer to be dealt with as freeborn citizens competent like others to care for their own affairs, and capable like others of engaging in all the activities of business life unfettered by political restraints. To them the words of the great declaration promulgated in this city a hundred and thirty-five years ago that all men are born free and equal and entitled to life, liberty and the pursuit of happiness must have a changed meaning. They are to be dealt with as incompetent wards of the state who must be protected against themselves, incapable of freely contracting for their services and subject like the medieval serfs to assumed task-masters, who must answer for their safety and be responsible for their mishaps. Is that to be the future spirit of our constitution and of our economic system? Is it the spirit of Americanism under which our country has achieved its greatness? The employee of yesterday will be the employer of to-morrow. Our future captains of industry will be recruited not from the ranks of wealth, but from the descendants of the horny-handed sons of toil. Politically, America knows no servile class. Is all this to be changed and a spirit of state socialism to be inculcated in our rising generation through the operation of laws which make the employer the keeper of those whom he employs? To-day one of the gravest financial problems which confronts our local systems of rapid transit is the damage suit for real or alleged injuries to those in transit. Fraud and blackmail play a leading part. In New York, the passage of the recent Employers' Liability Law was the signal for a heavy increase in the claim ratios of the insurers. From England, and even Germany, come the same story of the weakening of the moral fibre of the classes whom such laws aim to protect.

We are treading on dangerous ground in seeking to follow the footsteps of Europe regarding employers' liability. We are in

danger of sacrificing the nation's birthright; the independent manhood and political equality of the individual citizen won by the founders of the Republic through the sufferings at Morristown and Valley Forge. Can the American people afford to surrender it for any gains that may come through the better protection of the working classes against the risks attendant on our complex industrial conditions? Is it not better that another solution of this grave industrial problem be sought? To me the true solution lies along the line of insurance, not compulsory but voluntary, on the part of the workman himself as an intelligent self-respecting citizen to whom has been committed his full share in the government of his country. Aided and encouraged he may well be by any legislation which will not sacrifice his manhood or violate the constitutional rights of his fellow members of society. It is right that he should be protected and he should be educated to it as to every other civic duty. It is right that the cost of his protection should be an element of his compensation for his labor. But I believe that in doing so no jot or tittle of the spirit of the American Constitution should be surrendered. Not long ago, the business activity of all France was suddenly checked by a gigantic strike of employees to ameliorate their social conditions. The hand of the government itself was threatened with paralysis. It was successfully met and its backbone was broken by a call to the colors. The strikers were called on to choose between their obligations to their country and the betterments for themselves which they sought by overturning its social order. The spirit of patriotism prevailed and they rallied round the flag. The same fundamental issue underlies this question of liability legislation. Shall it be dealt with in a spirit which recognizes the paramount claims of the constitutional principles on which our government was established, those of political equality and individualism, or shall these be sacrificed for socialistic principles which will divide society into two classes: one of industrial serfs, wards of the state incapable of self-protection, the other of overlords commissioned to be their legal guardians? It is natural to move along the line of least resistance and to seek the remedies which offer the speediest relief regardless of the future. But I take it that the manhood of the future American citizen and the political equality which is his birthright may be worth even more than the material advantages of socialistic laws. When the proud Roman matron declared of her

sons, *haec mea ornamenta* (these are my jewels), she uttered a truth which equally applies to every commonwealth. The real strength of a nation lies in its citizens, not in its material possessions. The downfall of the mightiest empire of antiquity was heralded by its accumulating wealth attended by the breaking down of the moral fibre of its people. I would have every worker standing side by side with his employer as a political sovereign trained to insure his own protection and aided, if need be, by the state within constitutional lines to exact the compensation for his services necessary for the purpose.